



Scottish
Civil Justice
Council

Consultation on Draft Court Rules in Relation to Reporting Restrictions: Analysis of Responses

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CONTENTS

INTRODUCTION	1
Background	1
Proposals consulted on	1
The consultation	2
OVERVIEW OF ANALYSIS AND RESPONSES	4
The respondents	4
Analysis of responses	4
Overview of themes identified	5
RESPONSES TO SPECIFIC QUESTIONS	6
NEXT STEPS	14

INTRODUCTION

Background

1. The Scottish Civil Justice Council (SCJC) considered proposals to amend the Rules of the Court of Session in respect of reporting restrictions at its meeting of 10 June 2013. The SCJC agreed to publicly consult prior to considering draft rules further.

Proposals Consulted On

2. The draft rules proposed to substitute for existing Chapter 102 (reporting restrictions under the Contempt of Court Act 1981) new Chapter 102 (reporting restrictions), in relation to the Court of Session procedure for all court orders restricting the reporting of proceedings. The draft Act of Sederunt accompanying the consultation made provision for the Court of Session only. It was proposed that the draft rules would apply to all orders that restrict the reporting of proceedings, and, introduce the opportunity for the media to make representations to the court before such an order is made.
3. The following paragraphs briefly explain each draft rule.
 - a. Rule 102.1 (application of this Chapter). This rule provides that the Chapter would apply to all orders which “restrict the reporting of proceedings”.
 - b. Rule 102.2 (notification of consideration of reporting restriction). This rule specifies that where the court is considering making an order it shall send (in practice by email) a copy of the draft order, together with a note of the circumstances in which the making of the order is being considered, to those persons who have asked to see such orders.
 - c. Rule 102.3 (representations). This rule allows a person who would be directly affected by the making of an order (ordinarily the media) the opportunity to make representations to the court before an order is made. Under the rules, parties would have 48 hours within which to make and lodge representations with the court.

- d. Rule 102.4 (non-notification). This rule allows the court, where there are compelling reasons not to inform the media, to dispense with rule 102.2 and 102.3.
 - e. Rule 102.5 (notification of reporting restrictions). This rule replicates the existing arrangements, providing that where the court has made an order then it will be published on the Scottish Court Service website and emailed to the media.
 - f. Rule 102.6 (applications for variation or revocations). This rule replicates the existing arrangements, allowing the media, at any time, to seek the variation or revocation of an order.
4. It was suggested in the consultation paper that the amendments contained in the draft rules be replicated in the existing rules for the sheriff court and for the criminal courts (with the results of the consultation to be shared with the Criminal Courts Rules Council). Views were sought on this approach, and on whether there should be a standalone set of rules for the civil courts or whether there should be separate rules for each.

The Consultation

5. The consultation¹ set out the current arrangements in relation to reporting restrictions, the proposed changes, and the reasons why these changes were being proposed. The consultation was accompanied by a draft Act of Sederunt and explanatory notes as to its effects. A total of 9 questions were included, each of which looked for a selection of one given answer from a list; either by choosing an agree/disagree/no preference option or by asking respondents to indicate a preference amongst a number of options. Each question offered a 'comment' field for further elaboration.
6. The consultation was sent directly to press organisations, stakeholder groups who had expressed an interest in the work of the SCJC and the civil justice

¹The SCJC Reporting Restrictions Consultation is available here:

<http://www.scottishciviljusticecouncil.gov.uk/publications/consultation-on-rules-on-reporting-restrictions>

system, local authorities, legal practitioners and representative bodies, and members of the judiciary.

7. The consultation was publicised through a news release, via Twitter, and was placed on the SCJC website, with responses from the public invited.
8. The consultation period ran for 10 weeks and ended on 02 October 2013, although later responses were accepted. Those who responded to the consultation included bodies within the legal profession, members of the judiciary, local authorities and representatives of media groups. The responses were varied and informative as to the views of those involved in litigation and those likely to be affected by changes to the arrangements in relation to reporting restrictions. The responses also highlighted concerns about particular aspects of the changes and how they should be implemented.
9. The findings of the consultation were presented to the SCJC at its meeting of 18 November 2013 in order that respondents' views could be taken into account in its further consideration of the policy to be adopted in relation to the rules for reporting restrictions.

OVERVIEW OF ANALYSIS AND RESPONSES

The Respondents

10. In total there were 10 responses from a selection of stakeholders. All of respondents indicated they were happy for their responses to be made available to the public and published on the SCJC website.

11. Nine organisations and one individual responded to the consultation. For the purposes of analysis, the responses have been grouped into the following categories:

Category	No. of Responses		
	Organisation	Individual	Total
Legal Profession	3	0	3
Judiciary	2	0	2
Media	1	1	2
Local Authority	3	0	3
Total	9	1	10

Analysis of responses

12. The majority of the questions asked respondents to indicate their view in either a positive or negative manner with a third option of 'no preference' also being available. Care has been taken in the analysis to look beyond the tick box selected to the comments offered, so as to accurately represent the opinions of the respondents on the issues consulted upon.

13. Nevertheless, any interpretation of the proportion of responses in agreement must be undertaken with caution. Due to the relatively small number of

responses, it is not considered appropriate to present the results in percentage form.

14. The final question of the consultation offered respondents the opportunity to express any views they felt had not been touched upon in the questionnaire. These views have been developed and presented in the analysis thematically.
15. All the responses were published on the Scottish Civil Justice website: <http://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/consultation-responses>.

Overview of Themes Identified

16. Broadly speaking, the consultation sought to establish stakeholder views on whether existing rules on reporting restrictions should be replaced with new rules applying to all orders that restrict the reporting of proceedings, and which would introduce the opportunity for the media to make representations to the court before such an order is made.
17. In general terms, responses to the consultation focussed on the arrangements for non-notification of the media, the absence of an appeal mechanism and what might happen in the period between an order being sought and it being made.
18. All respondents held the view that new rules should be made and that the media should be given the opportunity to be heard before an order is made restricting reporting.

RESPONSES TO SPECIFIC QUESTIONS

Question 1

Do you agree or disagree that new rules should be made in respect of reporting restrictions?

19. There were 9 responses to this question. All agreed that new rules should be made.

Question 2

Do you agree or disagree that the amendments in the draft rules be replicated in the existing rules for the sheriff court and for the criminal courts?

20. There were 9 responses to this question, 8 of which agreed that the draft rules should be replicated in the existing rules. The majority agreed that as the principles involved are, as the Sheriffs' Association stated, "identical for all Courts", that consistent approach was preferable, and consequently that changes to the rules ought to be replicated in the sheriff court and the criminal courts.

21. The Crown Office Procurator Fiscal Service (COPFS), however, disagreed with the approach. It stated that criminal proceedings are unique and asked for "separate consideration to be given to the introduction of such rules and processes within the criminal courts".

Question 3

Which would you consider preferable: a standalone set of rules applicable across the Court of Session and sheriff court, or separate rules for each?

22. There were 9 responses to this question, 5 of which favoured separate rules for the Court of Session and sheriff court. The remaining 4 respondents indicated a preference for a standalone set of rules applicable across the Court of Session and the sheriff court.

23. Of those that favoured separate rules, the reasons given were generally that separate rules would allow for "best clarity" (Faculty of Advocates) and for procedural differences across the different systems to be reflected in the rules. The Sheriffs' Association commented that separate rules would "have the great

merit of maintaining for each Court and each procedure a reasonably comprehensive code applicable to each Court”.

24. Respondents with a preference for a standalone set of rules, such as the Sheriffs’ Principal, were of the view that standalone rules would be “more readily understood and less complex to enact”. Notably, even amongst those that preferred separate rules, there was agreement that the substance of the rules should remain the same, with only procedural differences being enacted in the rules.

Question 4

Do you consider that any particular or special provision would require to be made in respect of these matters in different types of court proceedings? Please give details.

25. There were 7 responses to this question. Six respondents indicated their view that no special provision in respect of different types of court proceedings was necessary. One respondent suggested that special provision would be required. One respondent stated that they had no preference.
26. Comments made by those respondents indicating a preference against making special provision pointed to the fact that rules could be drafted to cover a variety of cases and also to the importance of maintaining flexibility so that the requirements of particular cases could be accommodated.
27. South Lanarkshire Council stated that special provision would be necessary to ensure that the procedure would not result in a delay to court proceedings where reporting would be restricted regardless (e.g. in a closed hearing), due to the nature of the case.

Question 5

Do you agree or disagree with the approach adopted in rule 102.1, i.e. that the rules apply to “orders which restrict the reporting of proceedings”? If you disagree, please give reasons for your answer.

28. There were 9 responses to this question. 7 respondents indicated that they agreed with the approach adopted in draft rule 102.1 and that the rules should

apply to “orders which restrict the reporting of proceedings”. COPFS stated that it had no preference in this regard.

29. Most respondents considered that the approach adopted in rule 102.1 was appropriate, and that the “broad approach” was helpful.
30. South Lanarkshire Council, however, disagreed with the approach on the basis that a clearer definition was required, specifically one which would detail those orders to which the rule would apply. This view was reflected to a degree in the Sheriffs’ Association response, which, although indicating agreement in principle with the approach, expressed a preference for a clearer definition of the meaning of the term “orders which restrict the reporting of proceedings.”

Question 6

Do you consider the 48 hour period for making representations to the court under rule 102.3 to be appropriate? Please give reasons.

31. Of the 9 respondents who answered this question, 6 indicated that they agreed the 48 hour period for making representations to the court under rule 102.3 was appropriate. 3 respondents, an individual, COPFS and The Law Society of Scotland disagreed, each stating that that they would favour a shorter time period.
32. COPFS raised a concern that a delay of 48 hours could adversely impact criminal proceedings, and pointed to the resultant effect that may have on the victims and witnesses involved in the proceedings.

Question 7

If you answered “no” to question 6, what alternative period do you consider would be appropriate?

33. There were 3 responses to this question. Two respondents suggested that where possible, presentations to the court under rule 102.3 should be made earlier, as with the Law Society of Scotland which suggested instead “as soon as reasonably practical but at the latest at the start of the proceedings the next day”. An individual also commented that “there is no reason why the hearing cannot take place prior to the recommencement of proceedings the following morning.”

34. The response from the BBC suggested that an “additional safeguard” would be welcome, that is, one that would allow the court, on cause shown, to extend the 48 hour period.
35. The BBC wished to see further clarification in the rules as to what information should be given to the media when justifying the application for an order. That individual stated: “The rationale, both factual and legal, for the application must be made plain.”
36. This question also raised the issue among respondents for the need for an interim order to address what happens in the period after an order has been applied for in proceedings. This was highlighted by both The Law Society of Scotland and COPFS who stated that consideration should be given to the introduction of an interim order to restrict the reporting of proceedings during the 48 hour period.

Question 8

Do you agree or disagree with the terms of rule 102.4 in respect of non-notification? Please give reasons for your answer.

37. Nine respondents answered this question. 6 of the responses agreed with the terms of rule 102.4 in respect of non-notification, and 3 disagreed with the terms of the rule. Those in agreement included legal bodies such as COPFS, the Faculty of Advocates, the Sheriffs’ Association, the Sheriffs’ Principal, and both Local Authority respondents. Those opposed were media representatives and the Law Society of Scotland.
38. Both COPFS and the Sheriffs’ Association agreed that a rule of non-notification is necessary to cover situations where notification of the media would defeat the purpose of the order being made. This was echoed by the Sheriffs’ Principal, who advised caution, noting that the rule of non-notification should be utilised only infrequently, and suggested that rule 102.4(2) should read: “(2) The court, if persuaded that said reasons are sufficiently compelling, may dispense with rule 102.2 and 102.3.”
39. The Law Society of Scotland disagreed with the inclusion of a rule of non-notification, viewing non-notification as against European Convention of Human Rights (ECHR) principles which they stated, “make it clear that court orders cannot be granted against parties without such parties having the opportunity to be heard on the matter.”

40. The responses from the media representatives expressed disagreement with the rule of non-notification. They considered that the rule should make it clear that the court has a duty to closely scrutinise any application and ensure that relevant principles, such as section 12 of the Human Rights Act 1998², in all cases, are applied (including those where the application is not intimated to the media).
41. In responding to question 8, the Faculty of Advocates highlighted the issue of onus, specifically, where the onus should lie at each stage of the procedure as envisaged by the rules, stating: "In particular, consideration should be given to whether reversal of the onus is an acceptable consequence of there being compelling reasons for non-notification under rule 102.4." Furthermore, the Faculty suggested that were provision for an interim order to be granted the onus would remain with the party seeking the order, as opposed to falling upon any party seeking recall or variation.

² Section 12 of the Human Rights Act 1998 relates to "Freedom of Expression". The full section can be accessed here: <http://www.legislation.gov.uk/ukpga/1998/42/section/12>.

Question 9

Do you have any other comments on the proposals contained in this paper?

42. Six respondents answered this question and provided additional comments on the following issues:

- **Ongoing case appealed to the Supreme Court**

43. Both the BBC and Faculty of Advocates recommended delaying finalising the draft rules until the UK Supreme Court's decision in mid- December which is expected to address this area of substantive law (*Application of BBC Scotland re A v Secretary of State for the Home Department [2012] CSIH 43*).

- **Rule 102.6(5) and a right of appeal**

44. Four of the respondents who gave additional comments indicated their concern with regard to rule 102.6 (5), which as drafted, stated that "the decision of the Court [in relation to an order] is final".

45. The Sheriffs' Association commented that it could not see any justification for this provision. One individual and the Law Society of Scotland both considered that this rule is not in keeping with the undertaking given by the UK Government to the ECHR in the case of *Channel Four v. UK DR ECHR Vol 56/156* and, that in the redrafting on the rules on reporting restrictions, "the opportunity to make Scots law ECHR compliant should be taken". Furthermore, respondents concerned about this issue suggested that without the safeguard of a right of appeal, issues may arise with regard to fairness and Article 6 ECHR compliance.³

³ Article 6 ECHR, Right to a Fair Trial (1): "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." *European Convention on Human Rights*, available at, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

46. In total, 5 respondents stated that the “normal appeal route” should be available. The Faculty of Advocates suggested that there should be a mechanism for review by a higher court in such an area of law, dealing with fundamental human rights. However, should a right of appeal be introduced, the Faculty recommended that the variation or revocation of an order should only be capable of being sought in cases where there is a material change of circumstances.

- **Clarity in the Rules**

47. Three of the respondents stated that the rules needed more clarity. COPFS and South Lanarkshire Council highlighted practical concerns, asking, for example, who should be responsible for drafting the note that would accompany the draft order.

48. The Faculty of Advocates also sought more clarity with regard to rule 102.2 (3) and what is meant by “a note setting out the circumstances out of which the making of an order is being considered.” Further, they raised the same issue of clarity, but with regard to draft rule 102.2(1), and commented that a clarification of the meaning of “(...) where the court is considering making an order” is needed.

- **Practice Guidance**

49. Two respondents stated that detailed practice guidance notes would be a necessary accompaniment to the new rules.

- **Section 12 of the Human Rights Act 1998**

50. In responding to question 9 the BBC took the opportunity to affirm that section 12 of the Human Rights Act 1998 would be engaged even if the press or media are not involved, or choose not to intervene in, proceedings in which an application for reporting restrictions is made.

- **Onus**

51. The Faculty of Advocates, as mentioned previously, highlighted again the issue of onus, and stated that the rules should be written so that it is made clear that “the onus is on the party seeking the order to persuade the court.”

- **Provision for an interim order**

52. Four respondents suggested that a provision in the rules for an interim order should be made.

53. COPFS were concerned as to what would happen during the 48 hour period (during which parties would lodge and make representations to the court) and that there is nothing preventing publication of the proceedings during this timeframe. This was echoed by an individual respondent and the Law Society of Scotland.

54. The Faculty of Advocates also considered that providing for an interim order might offer a way to balance the rights of all parties, and stated: “In the event that a court is of the opinion that there are compelling reasons why an order should be made prior to notification then provision could be made in the new rules for an interim order to be granted.”

NEXT STEPS

55. The SCJC has agreed to suspend its final decision on rules for reporting restrictions until the UK Supreme Court's decision in *Application of BBC Scotland re A v. Secretary of State for the Home Department*, in which this area of law is at issue, is known.
56. The SCJC is grateful to all the individuals and organisations who responded to the consultation. These responses will be of great assistance to the SCJC in its further consideration of the matter.

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